IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 396 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? :

3. Whether Their Lordships wish to see the fair copy of the judgement? :

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? :

5. Whether it is to be circulated to the Civil Judge? :

AMRUTBHAI BHOLIBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR ND NANAVATI SR ADVOCATE WITH MR HARIN P RAVAL for Petitioner

MR AD OZA PP for Respondent No. 1 - State.

MR HAROOBHAI MEHTA, SR. ADVOCATE WITH MR JAYESH A DAVE for Respondent No.2.

MR JB PARDIWALA for Respondent No. 5 - complainant.

CORAM : MR.JUSTICE A.M.KAPADIA

Date of Order: 20/09/2000

C.A.V.JUDGMENT

1. In this petition which is filed under Article 226

of the Constitution, the petitioner against whom C.R. No.I-38 of 2000 is registered for the offences punishable under Sections 302 and 34 of the Indian Penal Code ('IPC' for short hereinafter) as well as Section 25 (1) (c) of the Arms Act ('the Act' for short hereinafter) with Sarkhej Police Station has prayed to issue a writ of mandamus to quash and set aside the resolution of the Government of Gujarat dated March 22, 2000 appointing Mr. K.J. Shethna, Advocate, as Special Public Prosecutor for conducting C.R.No.I-38 of 2000 at the District and Sessions Court of Ahmedabad (Rural), Mirzapur, Ahmedabad and High Court for bail and trial.

2. It may be stated that by the said Government resolution, Mr. Rajendra Shirodkar and Mr. Adhik Shirodkar, advocates are also appointed to assist Mr.K.J.Shethna and, therefore, their appointments as such are also challenged.

3. Earlier it was stipulated in the said resolution that Mr. Shethna, Mr. Rajendra Shirodkar and Mr. Adhik Shirodkar would be paid fees by the original complainant Mrs. Arti Arvindbhai Patel but the Government has amended the said resolution by another resolution dated August 22, 2000 mentioning that Mr. K.J. Shethna and M/s. Shirodkars shall be paid fees by the Government which will be decided later on and the petitioner has, therefore, challenged the validity of the said amended Government resolution also.

4. The petitioner is one of the accused in C.R.No.I-38 of 2000 registered with Sarkhej Police Station for the offences punishable under Sections 302 and 34 of the IPC as well as 25 (1) (c) of the Act. At present he is in judicial custody. The allegation against the petitioner is that on February 20, 2000, he in the company of his son Virendra and son-in-law Dharmendra went to Shantivan Farmhouse situated in the sim of village Makarba and killed his son Arvindbhai, who had also a share in the said farmhouse, by firing shots from his revolver. The widow of the deceased has filed complaint as a result of which the above numbered C.R. is registered against the petitioner and others.

5. The widow of the deceased was of the view that the accused being influential persons would thwart the course of justice and she would not get justice. Therefore, she applied to the Legal Remembrancer and requested to appoint Mr. K.J. Shethna or Mr. Rajendra Shirodkar or Mr. Adhik Shirodkar as Special Public Prosecutor for conducting the case which is launched

pursuant to her complaint.

6. The Legal Department attempted to obtain the consent of the advocates for being appointed as Special Public Prosecutor. But Mr. Rajendra Shirodkar and Mr. Adhik Shirodkar did not show willingness to be appointed as Special Public Prosecutor but expressed their willingness to assist Mr. K.J. Shethna if he was appointed as Special Public Prosecutor. The Government of Gujarat after considering the matter in detail issued resolution dated March 22, 2000 appointing Mr. K.J. Shethna, Advocate as Special Public Prosecutor for conducting C.R.No.I-38 of 2000 at the District and Sessions Court, Ahmedabad (Rural), Mirzapur, Ahmedabad and in High Court for bail matters and trial and specified in the said resolution that Mr. Rajendra Shirodkar and Mr. Adhik Shirodkar will assist Mr. K.J. Shethna. In the said resolution it was stipulated that Mr. Shethna and M/s. Shirodkars shall be paid fees by the complainant Mrs. Arti Arvindbhai Patel. Thereupon Special Criminal Application No. 396 of 2000 is filed challenging the said resolution on the following grounds:

(1) Appointment of Special P.P. is without consultation with the High Court as required under section 24 (1) of the Code of Criminal Procedure ('the Code' for short hereinafter) and, therefore, bad in law.

(2) Payment of fees to the Special PP by the original complainant is illegal.

(3) Appointment of an advocate as Special PP in terms of choice of the complainant is bad in law.

(4) Mr. K.J. Shethna, learned advocate who is appointed as Special PP has bias against the petitioner and, therefore, resolution making his appointment as Special PP being malafide, is bad in law.

7. Mr. M.M.Mehta, under Secretary to the Government of Gujarat, Legal Department, has filed affidavit in reply on behalf of the State of Gujarat justifying the resolutions which are challenged in the petition. In the reply it is stated that because of the brutal murder which is alleged to have been committed by the petitioner and the plea of the widow as well as the allegations made in the complaint it was thought it fit to appoint Special PP for conducting trial before the Sessions Court and before the High Court which is quite legal. It is

further stated that the accused in this case are very rich as well as influential persons and, therefore, to see that the widowed complainant gets justice and free trial is conducted, resolution was passed by the Government appointing Mr. Shethna as Special PP. It was further stated that Mrs. Arti Arvindbhai Patel had mentioned in her application that the accused are very influential persons both monetarily as well as politically and as she had shown her willingness to bear the expenses to be incurred by the State Government for appointment of Special PP and two other advocates who were to assist the Special PP it was stipulated in the resolution that fees of the Special PP and advocates appointed to assist the Special PP shall be paid by her.

8. Smt. Arti, widow of victim Arvind Amrutbhai Patel who is the original complainant has filed an affidavit dated September 5, 2000 disputing the claim made by the petitioner in the petition and pointed out the circumstances justifying her request to the Government to appoint Special PP to conduct the case against the accused and resolution resolution which is challenged in the petition.

9. As observed earlier, during the pendency of the petition, the Government has issued resolution dated August 22, 2000 mentioning that the fees shall be paid by the Government to the Special PP and the advocates who are appointed to assist the Special PP. Therefore the petitioner had sought permission to amend the petition which was granted and the petitioner has challenged the amended Government resolution on the following grounds:

(i) it is a fraud on exercise of the statutory power,

(ii) malafide because earlier resolution was bound to be struck down in view of the decision of the Supreme Court in the case of Mukul Dalal and others v. Union of India and others, 1988 (3) SCC 144,

(iii) it is not passed by the competent authority, and

(iv) it is an abuse of administrative power conferred upon the authority and is exercised to vindicate the stand of a vengeful complainant.

10. Mr. M.M. Mehta, Under Secretary, Legal Department, Government of Gujarat, Gandhinagar, has filed further affidavit in reply dated September 13, 2000 to the amended petition and denied the contention raised by

way of amendment. However, it is not necessary to deal with the said reply in detail at this stage.

11. I have heard Mr. N.D. Nanavati, learned Sr. Advocate for the petitioner, Mr. A.D. Oza, learned P.P. for respondent No.1 State, Mr. Haroobhai Mehta, learned Sr. Advocate for respondent No.2 and Mr. J.B. Pardiwala, learned advocate for respondent No.5. I have also considered the documents which are produced by the parties on record of the petition and various decisions cited at the bar.

12. Mr. Nanavati has raised points which are mentioned in the petition and, therefore, I do not think it proper to reproduce his arguments in this judgment. Similarly, it is also not necessary to reproduce the arguments advanced by the learned counsel for the respondents.

13. This is an appointment made under Section 24 (8) of the Code. In view of the judgment of the High Court of Gujarat interpreting Section 492 (1) of the Old Code and Rule 38 of the Gujarat Law Officers' (Condition of Service) Rules, 1964, rendered in the case of Dilipbhai Chhotalal v. State, reported in XII GLR 999, stipulation that the remuneration of the Special Public Prosecutor is to be fixed and paid directly under an agreement between the Prosecutor and the private complainant is not illegal. However, in this case, resolution appointing Mr.K.J.Shethna, as Special PP is amended and now it is stipulated that his remuneration as Special PP will be paid by the Government, to be settled later on. Therefore, when the State Government has to fix and pay the remuneration directly to Mr.K.J.Shethna the appointment cannot be regarded as illegal.

14. In Mukul Dalal's case (supra) while considering appointment of the Special PP under Section 24 of the Code, the Supreme Court had also considered the provisions of Maharahstra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 and more particularly Chapter III Rule 22 of the said Rules and held that Rule 22 was ultra vires because it enabled the competent authority to make appointment of Special PP on mere asking by a private complainant. In the said decision it is also ruled that remuneration should be paid by the State when appointment of Special PP is made. The Supreme Court considered the Division Bench judgment of this Court which is mentioned earlier and in para 10 of the reported decision the Supreme Court has held as under:

"The next question would be whether the Special Public Prosecutor should be permitted to be paid by the private complainant. There is considerable force in what has been stated by the Kerala High Court in the case we have referred to above. There may be certain cases where exception may be made, such as where the prosecutor is a public sector undertaking, a bank whether nationalised or not, an educational institution and the like. The rate of fees should be prescribed and the private complainant should be called upon to deposit the fees either with the Remembrancer of Legal Affairs or a prescribed State agency from where the fees would be drawn by the Special Public Prosecutor. To leave the private complainant to pay to the Special Public Prosecutor would indeed not be appropriate. We would make it clear that we do not support the conclusion of the High Court that as a rule whenever there is request of appointment of a Special Public Prosecutor or an Assistant Public Prosecutor, the same should be accepted. The Remembrancer of Legal Affairs should scrutinise every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view. Ordinarily the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant but there may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. In view of these conclusions and our disagreeing with the view of the High Court, the appeals shall stand allowed. Rule 22 of the Maharashtra Rules, referred to above, in our view is bad and the State Government should properly modify the same keeping our conclusions in view. The Remembrancer of Legal Affairs of the Maharashtra Government will now decide as to whether in the three cases referred to here, the services of a Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be provided and in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for

such Public Prosecutor or the private complainant should bear the same. There would be no order as to costs".

15. The observation made by the Supreme Court shows that as a rule whenever there is a request for appointment of a Special PP it should be scrutinised by the competent authority keeping in mind the prescribed guidelines and ordinarily the Special PP should be paid out of the State fund even if he appears in support of a private complainant. The Supreme Court after making above mentioned observation has hastened to mention that there should be some special case where the Special PP's remuneration may be collected from the private sources. The judgment of the Supreme Court would indicate that the view taken by the Division Bench of this High Court in Dilipbhai's case (supra) is not disapproved.

16. The record of the case shows that the original complainant, Mrs. Arti Arvindbhai Patel is well off and, therefore, it was stipulated in the original resolution that the fees of the Special PP and advocates appointed to assist the Special PP would be paid by the original complainant. Therefore, in view of the special case which was pleaded by the complainant and her financial position the stipulation that she would pay the fees of advocates to be appointed as Special PP could not have been regarded as illegal. However, now the resolution is amended and fees are to be paid by the State Government to be settled later on, which in no circumstances can be said to be illegal. Therefore, the petitioner cannot be granted any relief on the footing that subsequent amendment in the resolution stipulating that fees of the advocates would be paid by the State is bad in law.

17. The record of the case and more particularly different averments made in the affidavit in reply indicate that before making appointment of the Special PP, the competent authority has taken into consideration relevant factors such as, manner in which the crime is alleged to have been committed, helpless condition of the widow of the deceased, financial status of the accused and the political clouts they are enjoying, etc. Therefore, it is difficult to conclude that the resolutions are issued by the Government to vindicate the stand of a vengeful complainant or is malafide in any manner. The first contention has, therefore, no merit and is rejected.

18. The contention that appointment of Mr.K.J.Shethna as Special Public Prosecutor is made without consultation

with the High Court as required under Section 24 (1) of the Code and, therefore, should be declared as illegal, has no merits. Section 24 (1) of the Code provides that the State Government may appoint a Public Prosecutor or appoint one or more Public Prosecutors for conducting any prosecution, appeal and other proceedings on behalf of the State Government after consultation with the High Court, for conducting prosecution, appeal or any other proceeding. A Public Prosecutor and more than one Additional Public Prosecutors are already appointed in this Court after consultation with this High Court. Section 24 (8) of the Code empowers the State Government to appoint Special Public Prosecutor for the purpose of any case or class of cases which is quite different from conducting any prosecution, appeal or any other proceeding on behalf of the State Government in the High Court. However, Section 24 (1) of the Code contemplates that there should be only one Public Prosecutor but there can be appointment of one or more than one Additional Public Prosecutors and, therefore, the appointment of Mr.K.J. Shethna as Special Public Prosecutor under Section 24 (8) of the Code cannot be regarded as having been made under Section 24 (1) of the Code.

19. The reliance placed by the learned counsel for the petitioner on the decision in P.V. Antony and another v. State of Kerala, 1989 Cri.LJ, 2482, does not help the petitioner. In that case, an appeal under Section 378 (1) of the Code was filed by Special PP. It was contended that the appeal filed by him was not maintainable and the appeal could have been filed by a Public Prosecutor pursuant to the direction by the Government. The Kerala High Court has held that Public Prosecutor under Section 2 (u) would also include Special PP appointed under section 24 (8) of the Code and, therefore, the appeal was maintainable. The question whether Special PP could have been appointed only after consultation with the High Court is not considered in the said decision.

20. The question is squarely considered and answered by Division Bench decision of the Patna High Court in Shankar Sinha v. State of Bihar, 1995 Cri.LJ. 3143. Before the Patna High Court, appointment of a Special PP was challenged on the ground of malafide as well as on the ground that High Court was not consulted before making appointment as envisaged under Section 24 of the Code. The Patna High Court has has analysed the scheme envisaged under Section 24 of the Code in paras 3 and 4 of the reported judgment. After examining the scheme of Section 24 of the Code in detail, Patna High Court

negatived contention raised by making following pertinent observations in para 5 of the judgment which are as under:

"On a proper analysis of Section 24, we are left with no doubt that in the case of appointment of a Public Prosecutor or Additional Public Prosecutors to conduct cases in the High Court, the appointment has to be made in consultation with the High Court. In the case of appointment of Public Prosecutor or Additional Public Prosecutor for the district, the appointment has to be made on the basis of recommendation of the District Magistrate, who must make his recommendation in consultation with the Sessions Judge. In the case of special Public Prosecutor appointed for the purpose of any case or class of cases no consultation with any authority is required and the Central Government or the State Government is fully empowered to appoint anyone with the requisite qualification, as a Special Public Prosecutor. Since respondent No.6 has the requisite qualification, his appointment cannot be challenged."

21. I am in respectful agreement with the view expressed by the Division Bench of the Patna High Court which is mentioned above and placing reliance on the said decision I hold that it was not necessary for the State Government to consult High Court before appointing Mr. K.J. Shethna as Special PP in this case. Therefore, the said contention has no substance and is hereby rejected.

22. The submission that the appointment of Mr.K.J. Shethna as Special Public Prosecutor is made as per choice of the complainant and, therefore, Mr.K.J. Shethna would not be able to act impartially has also no substance and merit.

23. Role of the prosecution in any criminal trial, whether at the instance of the State or of a private party, is to safeguard the interest of the complainant and the accused. The right to be heard included right to be represented by spokesman of one's confidence. This right is available to the complainant and to the accused both. The complainant also needs assistance. The Public Prosecutor is bound by law and professional ethic and in the role of an officer of the Court to employ only fair measures. Hence, it cannot be said that the Special Public Prosecutor appointed as per the choice indicated by the complainant shall not act impartially or independently or that there is presumption that he would

always act in a biased manner. The presumption is always otherwise.

24. Moreover, in this case the complainant had indicated the choice for three different advocates. Out of them, two advocates refused to be appointed as Special Public Prosecutor because of their personal difficulties. Therefore it would be wrong to contend that the Government has made appointment of Mr.K.J.Shethna as Special Public Prosecutor with a malafide intention and only to harass the accused or that Special Public Prosecutor will not act fairly and impartially.

25. In Ajay Kumar v. State and another, 1986 Cri.LJ 932 (Delhi High Court) counsel of the private party was appointed as Special PP. It was contended that as Special PP was likely to act in a biased manner, his appointment was illegal. While negativing the challenge, what is observed by the learned Single Judge of Delhi High Court is as under:

> "17. Is the position of a public prosecutor any different merely because he is not the ordinary functionary of the State, but has been supplanted either at the instance of an aggrieved party, or a feuding faction, or even if appointed independently of the aggrieved party had prior association with the party, and has been amply rewarded by it, as in the present case? Can such a public prosecutor be said to be as well insulated against pressure of an aggrieved party as an ordinary public prosecutor would be or is at least expected to be but, what is more important, would his background not give the appearance of partiality or generate an apprehension of hostility in an impartial observer of the scene, as indeed, in the accused, who is so vitally interested in the fairness of a trial? Would this feature of the public prosecutor be capable of vitiating the trial or create an atmosphere which may smack of likelihood of or reasonable probability of bias. In seeking answers to these questions, it is necessary to keep in mind the clear distinction between the "reality" of a fair trial and the "appearance" that it is just, fair and reasonable. The concept of equality before the law and equal protection of the laws is in practice fairly diluted when it comes to the right of representation in a Court of law. Money and influence do play more than their due roles.

The decision of a cause in a Court of law is essentially determined by the law, as indeed, the facts of the case. Nevertheless, where an overburdened Special public prosecutor is pitched against eminent, competent and influential members of the bar with better training, specialised skills, able research and other faculties and aids, the fight cannot but be described as unequal. What makes the position worse is the declining moral standards of some of the services. There is, therefore, a wide feeling among the public that the representation for the State is comparatively less effectively and may also be easily tampered with through a variety of nefarious influences. If in that kind of an environment and influential or well-to-do aggrieved family feels impelled to engage a counsel of their own choice in whose competence and probity they have full faith and approach the State to engage such a counsel without any burden on the exchequer, it would be difficult to fault such an appointment even though one may not be happy that the State is unable to pay for proper legal services. The accused is no doubt vitally interested in the trial for it may result not only in his condemnation but even of deprivation of his freedom. The accused and the victim are not at par and criminal trial is not a forum for personal vengeance. It is essentially a State action to punish crime. There is, therefore, no other party involved but with all the concern for a fair trial and humane and civilised conditions in which the accused is treated, both during the investigation, in the course of trial, and after conviction, it is difficult to ignore the claim of the victims or of the aggrieved party to ensure that the crime is detected, properly investigated, and the accused is effectively tried, and suitably punished. A fair trial does not necessarily mean that it must be fair only to the accused. It must be fair to the victim also. It must be fair for all. A fair trial is a concept which is much higher than the claims or ends of parties to it. If the accused has a right to counsel of his choice why should not the victims of the crime be entitled to a say in the matter of representation of the State at the trial. The motive of the State and of the victim may be different but the object is common. Moreover, a party's counsel, who is engaged by the State at the cost of the aggrieved party is

equally bound by the higher duty to the Court as also to his discipline as an advocate, and is expected to rise to the occasion and discharge his duties as a just and fair public prosecutor unmindful of the source from which the funds are made available for payment to him. The material placed on record by the investigating agency places its own limitations on such a public prosecutor should he nevertheless carry a prejudice or a bias. Above all, there is institutional safeguard against any prejudice or bias or any vitiating elements flowing from such a public prosecutor or his association with a party or a faction in the judicial duty to sift the material and provide the necessary insulatory cover against any irrelevant, improper influencing of the trial. While there is no doubt that the association of such public prosecutor may perhaps disturb or dislodge the appearance of a fair trial or create a reasonable apprehension in the mind of the accused that with a hostile and partisan counsel in the garb of special public prosecutor he would perhaps be denied justice, or that trial would neither be just nor reasonable. But such feat must not be allowed to blur the judicial mind because of the institutional safeguard. It follows, therefore, that the appointment of party's counsel as a special public prosecutor does not by itself militate against the principle that State action must be just, fair and reasonable, and would not, without anything more, either vitiate a trial or deprive the trial for that reason alone of the appearance of a fair trial."

"20. While it appears to be the measure of legislative concern for a Sessions trial, because it involves comparative graver offences, trial in such Court has to be conducted by a public prosecutor but the moment a person, who is qualified for such appointment, is appointed Special Public Prosecutor under sub-sec. (8) of S.24 he is a Public Prosecutor by virtue of S. 2 (u) of the Code. Once he has been validly appointed, even a party's counsel is clothed in the garb of a public prosecutor he is entitled to conduct the trial. If he had not been so appointed he could have acted only under the direction of the Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the

case as provided in S. 301 (2). But ordinarily even such a private counsel, who acts under the directions of the Public Prosecutor, and may only, with the permission of the Court, submit written arguments after the evidence is closed in the case, nevertheless would be within the definition of the term "public prosecutor" in S. 2 (u) because the expression "public prosecutor", as defined there includes any person who is "acting under the direction of a public prosecutor". The status of such a counsel as Public Prosecutor is nevertheless dependent on his acting under the direction of a Public Prosecutor. He is unable to have complete control of the conduct and direction of the trial. It is unnecessary to consider, for the present purposes, if the Special Public Prosecutor was or was not acting under the direction of the Public Prosecutor because he is a Public Prosecutor by virtue of first part of the definition i.e., any person appointed under S.24. He is not a public prosecutor under the second part of the definition. The Special Public Prosecutor is, therefore, a Public Prosecutor in his own right by virtue of the appointment, and does not need any supervision, by any authority other than the State Government and Central Government or the Administration, as the case may be. Nothing, however, turns on these provisions since, as already pointed out above, there is no challenge to the validity of the appointment or the right to conduct the trial on the ground that there is any statutory disability or because the appointment does not conform to the statutory requirements. The challenge is dehors the statute and its provisions and was based on the constitution edicts, as interpretatively culled out of Arts. 14 and 21 of the Constitution of the highest Court."

26. It would be profitable to refer to the weighty observations made by the Division Bench of the Bombay High Court in Vijay Valia v. The State of Maharashtra, 1986 Cri.LJ. 2093 (Bombay High Court), at this stage, which are as under:

"8. We may now deal with the contentions raised before us. The first contention is that neither section 24 (8) nor Section 25 (1) lay down any

> guidelines for the appointment of Special Public Prosecutor or Assistant Public Prosecutor for a particular case or class of cases. We will proceed on the assumption that this is so. However we fail to understand as to how this contention can be raised on behalf of the accused. The petitioners/applicants before us are the accused in the respective cases and none of them is a complainant. The accused cannot claim a right that the prosecution against him be conducted by a particular prosecutor and not by any other. The contention, if at all, can be raised only by a complainant whose request to conduct the prosecution by a lawyer of his choice is rejected. It however appears that this contention is raised on behalf of the accused on the presumption that whenever a Special Public Prosecutor is appointed whether by the State or at the instance of a private party, a fair trial is denied to the accused. This is particularly so in the latter case where, it is contended, the prosecutor os bound to identify himself with the complainant and try to secure conviction by any means, fair or foul. The conduct of the prosecution may not be impartial and circumstances favourable to the accused and unfavourable to the complainant may not be placed before the Court."

27. The result of the above discussion is that merely because the appointment of Mr. Shethna as Special PP is made as per the choice of the complainant, it would not be reasonable to hold that he would not be able to act impartially. Mr. Shethna who is engaged by the State at the cost of the State is equally bound by the higher duty to the Court as also to his discipline as an advocate, and is expected to rise to the occasion and discharge his duties as a just and fair public prosecutor. Above all, there is institutional safeguard against any prejudice or bias because of the material placed on record by the investigating agency which in turn places its own limitations on such a Public Prosecutor.

28. Merely because in the affidavits which were earlier filed by the complainant in other proceedings she was identified by the Clerk of Mr. Shethna, it cannot be said that Mr. Shethna would not act as an impartial PP and has bias against the petitioner. Mr. J.B. Pardiwala, learned advocate who appears for the original complainant stated at the bar that the Clerk who had identified the original complainant is also his Clerk and

this statement is not disputed by the other side. The practice in the High Court is that a Clerk is a registered Clerk of one advocate but does the work of other advocates also. Therefore, description made by the Clerk as a registered Clerk of Mr. Shethna while identifying the complainant at the time of swearing the affidavit would not show that Mr. Shethna would not be able to act impartially as a Special PP. Therefore, this contention has also no substance and is rejected.

29. The last contention that Mr. Shethna, learned Advocate has in fact malice and bias against the petitioner has no factual business. It is relevant to note that no factual data is laid in the petition to substantiate this allegation. Performance of duty as a Special PP or opposing bail application on valid legal available grounds would not constitute malice or bias. In my court, four proceedings are filed relating to the crime registered against the petitioner and others. Out of the four proceedings, two proceedings have been disposed of by me. Misc. Criminal Application No. 5152 of 2000 was moved by Smt. Shantaben Amrutbhai Patel, wife of the petitioner to enlarge the petitioner and his son for temporary bail as mother of the petitioner has expired. Mr. Shethna, as Special PP had given consent for temporary release of the petitioner and his son on bail and after hearing the parties the petitioner and his son were released on temporary bail. It is also relevant to notice that Smt. Kashmiraben Dharmendrabhai Patel, wife of Dharmendrabhai Patel, who is son-in-law of the petitioner, had also moved an application for releasing Dharmendrabhai Patel on temporary bail being Misc. Criminal Application No. 5226 of 2000 as the mother of the present petitioner has expired. Therein also Mr. Shethna had given consent for temporary bail for a day or two. But the said application was rejected having regard to the facts of the case. If Mr. Shethna, learned counsel as Special PP had any malice or bias against the petitioner and his son and son-in-law he would not have given consent for temporary release of the petitioner, his won or his son-in-law on bail. This would indicate that Mr. Shethna has no malice or bias against anyone and more particularly against the petitioner, his son and his son-in-law.

30. I have observed the demeanor of learned advocates appearing in the case and more particularly that of Mr. Shethna because allegations of malice and bias were made against him. I have found that his performance as Special PP does not at all smack of malice or bias as alleged. On the contrary, he always has shown sympathy

due to the petitioner and gave consent when occasion so demanded. In this petition, no stay was granted as prayed for. But Mr. Shethna as Special PP has refrained from appearing in the matter where the petitioner is seeking temporary bail on health ground by filing Misc. Criminal Application No. 4072 of 2000. If at all he had any bias as alleged, he would have appeared in the said mater but he has voluntarily chosen not to appear till the question of his appointment as Special PP is decided by the Court. Thus, there is no factual basis or data available on the basis of which one can say that Mr. Shethna has malice or bias against the petitioner.

31. Learned counsel for the parties have cited at the bar few authorities on the point of malafide. But on going through them I find that they are not relevant for deciding this issue and, therefore, I have not discussed them.

32. For the foregoing reasons, I do not find any substance in the petition and the same is liable to be dismissed. The petition, therefore, fails and the same is accordingly dismissed. Notice is discharged.

(A.M. Kapadia, J.)